SOCIAL MEDIA IN THE WORKPLACE: LEGAL ISSUES & STRATEGIES FOR MANAGNG VIRTUAL COMMUNICATION AT WORK

A Thesis

Presented to the Faculty of the Graduate School

of Cornell University

In Partial Fulfillment of the Requirements for the Degree of

Master of Science

by

Saba Vahdat

May, 2014

ABSTRACT

With nearly one in four people worldwide maintaining active profiles on social networking sites like Facebook and Twitter, perhaps it was inevitable that employees would begin to use these platforms to voice their work-related complaints online. As a result, many organizations have pursued an active role in developing corporate social media policies and disciplining employees who post comments critical of their workplace. Through case analysis, this thesis examines the existing standards for protected concerted activity, evaluates how the National Labor Relations Board has interpreted labor law as it is applied to work-related social media cases, and provides guidance on how organizations can craft social media policies within the boundaries of the law. Through comprehensive interviews, this thesis also discusses labor education programs to train members on appropriate social media activity, as well the way unions have taken to online platforms to connect with members and ignite innovative campaigns.

BIOGRAPHICAL SKETCH

Saba Vahdat earned her Bachelor of Science with Honors in Industrial and Labor Relations from Cornell University in 2013. Saba is also a full-scholarship award recipient and graduate of the 2014 Harvard Trade Union Program. Saba is a member of a number of professional and student organizations including the Cornell University Hearing and Review Board, Phi Alpha Delta Pre Law Fraternity, and the Baha'i Faith Club. During her summers, Saba has assumed internships in both government and law, and is committed to promoting international human rights, particularly in Iran.

ACKNOWLEDGMENTS

My success in completing this Master's thesis is contributed to my advisor Professor Lipsky, who has supported me during these past two years. Professor Lipsky is the most sincere and well-respected person I know. I hope that one day I can be as friendly, passionate, intellectual and able to command an audience as well as he can. His enthusiasm for the topic and excellent guidance helped make completing this project both fun and meaningful. I would also like to thank Professor Hurd for his encouragement and dedication to work with me in transforming my thesis to be even more unique and groundbreaking. His profound knowledge in labor relations guided me as I explored different ideas and approaches to my thesis. Professor Hurd has been a tremendous mentor to me, and I would like to thank him for encouraging my research. I would also like to thank the many professors, Office of Student Services staff members, and reference librarians that I have had the opportunity to learn from during my undergraduate and graduate career. A special thank you goes to Minister Gligor Tashkovich, who encouraged me to apply to the Cornell University School of Industrial and Labor Relations.

Most of all, I would like to thank my parents. Dad, thank you for teaching me about hard work, and for telling me what I am capable of when I needed a reminder. Thank you for giving me the support that I needed to build a dream, and for believing that I have the ability to reach my goals. Mom, as I'm growing up, I realize just how much you have done for me. Thank you for always being there when I needed someone to talk to, or a shoulder to cry on. You have taught me how to know my value and to always see the positive in every difficult situation. Dad and Mom, I am truly blessed to have parents that have sacrificed so much so that I could have every opportunity in life to succeed.

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INTRODUCTION: NAVIGATING THE OPPORTUNITIES AND RISKS OF EMPLOYEE USE OF SOCIAL MEDIA IN THE WORKPLACE

The emergence of social media has forever changed the way people connect and interact with one another. With the number of social network users rising from 1.73 billion in 2013 to an estimated 2 billion by the end of 2014, the world is witnessing an undeniably rapid proliferation of new media.[1] With continued growth in social media, perhaps it was inevitable that its use would enter into the workplace for a variety of reasons; most interestingly being the way employees have taken to these platforms to voice their work-related complaints online. As people have become increasingly tethered to their computers and smartphone devices to check their personal Facebook and Twitter messages while at work, employees are often simultaneously using these platforms to air work-related frustrations. Social media has begun to create a thin, if almost imperceptible line drawn between our private and work lives. As a result, hardly a week goes by without yet another new story of an employee finding themself in hot water over their own tweet or Facebook post.

While employee use of social media in the workplace is a relatively new phenomenon, it has already begun to replace much of traditional face-to-face communication around the water cooler and the coffee machine. According to the most recent survey on social media activity in the workplace administered by Proskauer's Labor and Employment Law Group, 50% of employees across the United States admit to having uploaded messages, pictures or videos about their workplace on social media, and nearly 30% of all businesses have taken disciplinary action

[1] Marrouat, Cendrine. "Social Media in Numbers (April 2014)." 11 Apr. 2014. *Available* at

against employees in relation to inappropriate conduct on social media.[2] While some companies have begun to develop policies governing employee use of social media in the workplace, these corporate work-rules have frequently been found to be overly broad and unlawful, thus becoming a controversial issue within labor and employment law.

Through an in-depth analysis of social media case law and substantive interviews, this thesis analyzes how the National Labor Relations Board (NLRB or Board) has applied the principles of traditional labor law when deciding cases involving social media. My research also recommends ways in which employers can form lawful social media policies that place clear limits on social media posts without crossing the legal line. This body of work is unique because it is the first to undertake a comprehensive approach to examine case law as it relates to employee use of social media, and to address how unions are developing innovative strategies through social media to connect with members and supporters, and strengthen its position during labor negotiations.

To establish the foundation for the forthcoming discussion, Part I of this thesis discusses free speech rights at the workplace and provides an in-depth case analysis of protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). Tracing the Board's progression in defining protected activity will allow for a deeper understanding of the NLRB's interpretation when discussing its application to social media. Part II explores the implications derived from the NLRB's position regarding employee discipline resulting from social media

[2] Statistics are draw from a 2011 survey conducted by Proskauer Rose LLP. Survey results relied on the 250 responses from multinational businesses detailing their social media policies and practices. Participants included in-house counsel, executives and HR professionals across a broad range of businesses.

activity in *American Medical Response of Connecticut, Inc*.[3] Part III examines what types of comments posted on a social media platform are protected versus unprotected by the NLRA. Part IV explores corporate social media policies, and examines commonly found policy provisions that unlawfully restrict employee Section 7 activity. This segment also provides guidance on how employers can craft social media policies that protect a company's legitimate business interests, as well as adhere to the law. Part V addresses organized labor's efforts to educate members on the opportunities and legal risks associated with work-related online communication. In addition, this segment discusses how unions are using social media platforms to connect with members, potential members and supporters, as well as to strengthen their bargaining power during contract negotiations. Finally, Part VII offers a critique of the NLRB's position on social media in the workplace, and concludes with a look into the future of law and corporate policies in a twenty-first century workplace.

FREEDOM OF SPEECH AND SOCIAL MEDIA

As Facebook, Twitter and other social media platforms have developed as outlets for individuals to share their thoughts and feelings about the workplace, employees often argue that facing discipline for posting on a personal social media profile infringes upon their right to freedom of speech. The First Amendment of the United States Constitution reads, "Congress shall make no law…prohibiting the free exercise…or abridging the freedom of speech." For the most part, however, an individual's right to free speech does not apply to the workplace.[4] In the

[3] *American Medical Response of Connecticut*, Case 34-CA-12576 (2010).

[4] "The Constitution of the United States," Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

landmark case *Reno v. American Civil Liberties Union* (1997), the Supreme Court declared the Internet to be a free speech zone, and afforded it the same First Amendment protection as books, newspapers and magazines.[5] Even so, the First Amendment does not give private sector employees the constitutional right to free speech at the workplace, as the Amendment only applies when the government is trying to restrict an individual's ability to communicate his opinion. The First Amendment, however, provides free-speech protection to public employees, since the Bill of Rights applies to governmental actions.[6] Therefore, a private sector employer without a unionized workforce can discipline its employee as he sees fit, and is generally free to restrict employee speech at the workplace.

With respect to free speech on social media for public sector employees, in the case *Bland et. al. v. Roberts* (2013), the Fourth Circuit Court of Appeals ruled that public employees who press the "Like" button on Facebook may be engaging in a form of free speech protected by the Frist Amendment. In the case, a group of employees in the Sheriff's department were terminated due to their political affiliations and for supporting the Sheriff's opponent for re-election.[7] In particular, two employees had clicked the "Like" button on the Sheriff's opponent's Facebook page. In its decision, the Court of Appeals held, "On the most basic level, clicking on the "Like" button literally causes to be published the statement that the User "Likes" something, which is itself a substantive statement." By pressing the "Like" button on the campaign page of the incumbent Sheriff's political opponent, the Court of Appeals wrote, "is the Internet

[5] *Reno v. American Civil Liberties Union*. 521 U.S. 844 (1997).

[6] Hudson, David L. Balancing Act: Public Employees and Free Speech. Nashville, TN: First Amendment Center, 2002.

[7] *Bland v. Roberts*, 4th Cir., No. 12-1671 (2013).

equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."

Given the nature of social media, platforms such as Facebook and Twitter are often outlets where people casually express themselves often without thinking about the legal ramifications of their every post. Some organizations have even implemented complete restrictions on an employee's ability to engage in social media, even during non-working hours. The National Football League (NFL) is one example of an organization that prohibits players' to access their social media accounts immediately before, during and after football games to avoid damaging their team's reputation.[8] Instituting a blanket restriction on employee use of social media, as is in the case with the NFL, is a complex and gray area of the law. Although the NFL claims to have legitimate business interests for limiting its players from engaging in social media at certain times, complete restriction squelches an individual's right to a private life and ability to engage in protected concerted activity by discussing terms and conditions of employment.[9]

PROTECTED CONCERTED ACTIVITY UNDER THE NLRA

Since the inception of the NLRA in 1935, the meaning of "concerted activity" has been used as a term to "protect the basic rights of employees and employers, to encourage collective bargaining, and to restrain certain private sector labor and management practices, which can

[8] "League Announces Policy on Social Media for Before and After Games." NFL Enterprises LLC. 31 Aug. 2009. 2 Mar. 2014 < http://www.nfl.com/news/story/09000d5d8124976d/article/leagu-announces-policy-on-social-media-for-before-and-after-games>.

[9] Sánchez, Abril P, Avner Levin, and Riego A. Del. "Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee." American Business Law Journal. 49.1 (2012): 63-124.

harm the general welfare of workers and businesses."[10] At the heart of the NLRA is Section 7, a provision that establishes a number of lawful employee activities with which employers may not interfere.[11] Through the use of case analysis, this section presents an investigation of the types of employee activities considered to be concerted under the NLRA and examines how the Board's interpretation of concerted activity has evolved as the use of new technologies have developed in the workplace.

One of the first interpretations of concerted activity derived from the U.S. Supreme Court case, *Southern Steamship Co. v. NLRB* (1942). In this case, the Court held that the employer, Southern Steamship, violated the NLRA for discharging workers because of their union activities. These workers, however, were awarded no back pay since they had violated state law by staging sit-down strikes.[12] The U.S. Supreme Court expanded its view of protected concerted activity in *NLRB v. Washington Aluminum Company* (1962) when seven unorganized machine shop employees walked out of their workplace together to protest cold working conditions.[13] Worried what the effect of the walkout would be on employee discipline and plant production, the Company President immediately notified the employees who left the employer's premises of their discharge. The NLRB argued, and the Court agreed, that workers should not lose their protection under Section 7's "mutual aid and protection" clause "when they [employees] seek to

[10] "National Labor Relations Act." National Labor Relations Board <http://www.nlrb.gov/national-labor-relations-act>.

[11] Sec. 7. [§ 157] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

[12] *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 48 (1942).

[13] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 50 LRRM 2235 (1962).

improve terms and conditions of employment." The Court reasoned that since the employees walked out to compel the Company to address the coldness of the shop, this action was part of an on going "labor dispute." Therefore, the employees had engaged in protected concerted activity under federal labor law.

Mushroom Transportation Company (1964) provides an understanding of the NLRA's limits on protected speech under the Act.[14] In this case, Mushroom Transportation Company, an interstate motor carrier, terminated employee Charles Keeler after he told his fellow co-workers that "they were not getting what they were entitled to" under the existing union contract. The Employer fired Keeler for "being a troublemaker." Although the Board found Keeler's activities to be directly related to the employees' legitimate interests in terms and conditions of employment, the Third Circuit Court of Appeals found no evidence of an attempt to produce group action as a result of the conversations, thus concluding that Keeler had not engaged in protected concerted activity. The Court held that Keeler's actions "consisted of mere talk," and for talking to be protected under the NLRA, it must look towards group action. This case determined that if an employee's conversation does not signal an attempt to produce action, it is more than likely to be considered as mere "griping," rather than protected concerted activity.

The Board adopted arguably the most expansive interpretation of concerted activity in *Alleluia Cushion Company* (1975).[15] Here, a non-union employee wrote to the state Occupational Safety and Health (OSHA) office complaining about a lack in safety conditions at the workplace (i.e., no instruction regarding chemicals used in production, failure to provide protective guards

[14] *Mushroom Transportation Company* 330 F.2d 683 (3rd Cir. 1964).

[15] *Alleluia Cushion Co.,* 221 NLRB 999 (1975).

on machines, absence of first aid stations and eyewash stations). The employee was then discharged for sending the letter. The Board deemed that an individual employee's conduct is concerted if the activity was "on behalf of" or "for the benefit of" other employees, whether or not the other employees were aware of the conduct. In 1984, a newly constituted Board retreated from its decision in *Alleluia Cushion*, and in *Meyers Industries (I)* (1984), held that employees could be engaged in concerted activity only if they acted with, or on the authority of, other employees.[16] *Meyers Industries (II)* (1986) further expanded the definition of concerted activity to include those "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing group complaints to management's attention."[17]

One of the first cases that called upon the NLRB to apply its interpretation of protected concerted activity to employee communication through a second medium was the Supreme Court case, *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard)* (1952).[18] In *Jefferson Standard*, a union of television technicians in Charlotte, North Carolina had a dispute with their employer, Jefferson Standard. Employees engaged in what they thought to be peaceful picketing by distributing handbills on the street and in local businesses. These handbills claimed that Jefferson Standard considered Charlotte to be a "second class city" because it did not present any local programs on its Charlotte station. Shortly thereafter, the ten technicians responsible for distributing the handbills were fired. Although the NLRB held that the terminations were an unfair labor practice, the Supreme Court ruled that the employees' communications were so

[16] *Myers Industries (Myers I)*, 268 NLRB 493 (1984).

[17] *Myers Industries* (*Meyers II*), 281 NLRB 118 (1986).

[18] *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1952).

disloyal as to lose protection under the NLRA. The Court noted that the handbills were a "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." Moreover, the Court decided "there is no more elemental cause for discharge of an employee than disloyalty to his employer."

Another form of employee communication developed through the use of wearing specialty buttons, stickers and other insignia in the workplace. In *Leiser Construction* (2007), an employee displayed a sticker on his hardhat depicting a person urinating on a non-union rat.[19] The employer, Leiser Construction, told the employee to remove the sticker, or face termination. Upon review, the NLRB held that the Employer did not violate the NLRA by prohibiting the employee from wearing the sticker, since the Board deemed the particular sticker to be "unquestionably vulgar and obscene." On the other hand, in *P.S.K. Supermarkets, Inc.* (2007), the Board held that an employer could not discipline its employees for exposing customers to union insignia, absent "special circumstances."[20] The Board ruled that the employer bears the burden of proving such special circumstances, which may be as broad as unreasonably interfering with the public image that the employer has established.

With the emergence of e-mail, employee interactions at the workplace begun to shift to electronic devices. In *Guard Publishing Company (Register Guard)* (2007), the employer, Register-Guard, owned a daily newspaper in Oregon.[21] The Company's "Communications Systems Policy" stated, "communication systems are not to be used to solicit or proselytize for

[19] *Leiser Construction*, 349 NLRB 413 (2007).

[20] *P.S.K. Supermarkets, Inc.*, 349 NLRB No. 6, 181 LRRM 1151 (2007).

[21] *Guard Publishing Company v. NLRB*, 2009 BL 145295 (D.C. Cir. 2009).

commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." Employees used the Company e-mail system to communicate about work-related matters, but also to discuss personal matters such as jokes, baby announcements and party invitations. In the case, Register-Guard sent copy editor Suzi Prozanski written disciplinary warnings for e-mailing three union-related letters to her fellow employees. One e-mail was for the purpose of clarifying what Prozanski, who also was the union president, considered an inaccurate company communication. The other two urged union members to wear green on a certain date to support the union's bargaining position and to participate in the union's entry in a town parade. The message was composed on Prozanski's own time, but was sent from her workstation. Upon review, the Board held that employee communication through e-mail was not equivalent to face-to-face communication, and it was not unlawful for the employer to permit personal communications while banning non-business solicitations. In 2009, the D.C. Circuit reversed, in part, the NLRB's decision and held that the discipline of an employee for using a company e-mail system to solicit employees for union-related activities violated Section 8(a)(3) of the NLRA, which makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment." If an employer chooses to permit employees to use the company's e-mail system for personal use, it must equally permit employees to use such system to disseminate pro-union messages.

Most recently, the NLRB has applied the framework of protected concerted activity to cases involving employee use of social media. The NLRB General Counsel's Office has recognized the growing use of social media as a new form of communication and has issued twenty-one Advice Memoranda concerning cases involving disciplining employees for engaging in concerted activity using social media, and for unlawful social media corporate policies. When

analyzing the cases throughout this thesis, it is evident that while social media may present itself as a new medium in which employees interact, for the most part, the Board has applied principles derived from traditional labor law when determining whether Section 7 of the NLRA protects an employee's social media activity.

WHAT SPARKED THE NLRB'S INTEREST IN SOCIAL MEDIA CASES? AMERICAN MEDICAL RESPONSE OF CONNECTICUT

The first labor law case that sparked the NLRB's immediate attention to employee use of social media in the workplace and laid the groundwork for how the Board would decide future cases concerning employee communication on new media, was *American Medical Response of Connecticut, Inc.* (2010).[22] In this case, American Medical Response of Connecticut operated an ambulance company. The complainant, Dawnmarie Souza, a union paramedic, was asked to complete a written incident report relative to complaints about her work. Souza requested a union representative to assist her with the report; However, her supervisor Frank Filardo denied her request. Souza took to her personal Facebook page to post negative remarks about Filardo, in which her initial Facebook post stated that it "looks like I am getting some time off," and using her workplace's numeric code for a psychiatric patient, Souza commented, "love how the company allows a 17 to become a supervisor." Souza's Facebook friends responded with supportive remarks, of which Souza responded with further negative comments about her supervisor, calling him a "d**k," and later a "sc**bag." The day after Souza's Facebook remarks, she was suspended and then terminated from employment.

American Medical Response of Connecticut maintains a blogging and Internet policy that "prohibits employees from depicting the Company in any way without prior approval from its

[22] *American Medical Response of Connecticut, Inc.*, NLRB No. 34-CA-12576 (2010).

Human Resources department." The policy also forbids employees from making "disparaging, discriminatory or defamatory comments when discussing the company or employee's superiors, co-workers and/or competitors." Souza's union, the International Brotherhood of Teamsters Local 443, filed a charge against American Medical Response for maintaining overly broad social media work-rules, and for threatening Souza with discipline in response to the denial of the right to union representation during an investigatory interview.[23]

Upon review, the NLRB argued that Souza's Facebook postings should be considered to be protected concerted activity because the Company did not allow her to access union representation when she rightfully requested. In addition, the Board found the employer's blogging and Internet policy to be overly broad, and as a result, unlawfully limited its employees' right to discuss working conditions among themselves. Although the case was scheduled to be heard before an ALJ, a settlement between the two parties was reached before the date of the hearing. According to the Board's press release, under the terms of the settlement, American Medical Response agreed to revise its overly broad rules to ensure that they no longer improperly restricted employees from discussing their wages, hours and working conditions with co-workers.[24] The Company also promised that employees who request union representation in the future would not be threatened with discipline.

[23] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), was a case decided by the United States Supreme Court, which ruled that employees in unionized workplaces have the right under the National Labor Relations Act to the presence of a union steward during any management inquiry that the employee reasonably believes may result in discipline.

[24] NLRB Office of Public Affairs. "Settlement reached in case involving discharge for Facebook comments." Feb. 7, 2011. *Available* at http://www.nlrb.gov/news-outreach/news-story/settlement-reached-case-involving-discharge-facebook-comments

In *American Medical Response of Connecticut, Inc.*, the NLRB applied a fairly straightforward interpretation of employee Section 7 rights as was decided in *Southern Steamship Co. v. NLRB* (1942). While the two cases both involve the termination of an employee for union activities, the key difference is the manner in which the employees expressed their protected conduct. While in *Southern Steamship Co. v. NLRB*, employees took action by physically walking out of their employer's premises, in *American Medical Response of Connecticut, Inc.*, social media was used to express an employee's frustration of being denied the right to engage in protected conduct. From the terms of the settlement in *American Medical Response of Connecticut, Inc.*, it appears that whether a conversation takes place at the physical water cooler or virtually on Facebook, when employees interact with each other about the terms and conditions of their work, those employees are still considered to be participating in protected concerted activity under the NLRA.

Although social media presents itself as a new medium, the NLRB's argument draws heavily from traditional labor law. Alvin Velazquez, Associate General Counsel at the Service Employees International Union (SEIU), considers the NLRB's application of Section 7 rights to social media as "unremarkable."[25] The Board's interpretation of protected concerted activity in a case involving social media, like *American Medical Response of Connecticut, Inc.*, is no different from cases involving face-to-face interaction by the proverbial water cooler, or electronic communication on a company e-mail system. Velazquez argues that an employee's use of social media "is just a change of platform," and that the fundamental application of the law stays the same. Even though certain aspect in *American Medical Response of Connecticut, Inc.* may make it seem that social media does not alter the traditional application of protected

[25] Phone interview with Alvin Velazquez conducted on March 13, 2014.

concerted activity, certain features associated with Internet speech create situations in which existing rules are not always clear. Given this consideration, the NLRB's Office of the General Counsel has pursued an active role in providing guidance on the concerted nature of employee use of social media in the workplace.

NLRB ADVICE MEMORANDA PROVIDE GREATER INSIGHT ON SOCIAL MEDIA CASES

With the emergence of employee use of social media to discuss work-related matters, the NLRB is faced with numerous challenges as it adapts the present concerted activity standard to apply to unique aspects of social media. After having analyzed all the cases charged to the NLRB involving social media, the NLRB issued twenty-one Advice Memoranda addressed to regional NLRB offices on protected concerted activity and how it applies to employee use of social media. Through case analysis, these Memoranda address instances in which employees have been disciplined for posting comments critical of their workplace on the Internet, and provide examples of corporate social media policies that have been interpreted to chill employee Section 7 rights.

On August 30, 2011, just days after releasing its first report on social media, the NLRB issued a rule mandating all private sector employers to post notice of employee NLRA rights in a "conspicuous location" at the workplace.[26] When prompted about the timing of the NLRB's new rule, Former Chair of the NLRB Wilma Liebman shared that the Board's intentions were to get the attention of all private sector employers—those with and without a unionized workforce—to

[26] Press Release, NLRB, Board Issues Final Rule to Require Posting of NLRA Rights (Aug. 30, 2011), *Available at* https://www.nlrb.gov/news/board-issues-final-rule-require-posting-nlra-rights.

pay attention to the NLRB at the time it was issuing guidance regarding social media.[27] According to a recent statistic, 93% of employees not affiliated with a union are not familiar with their rights under the NLRA, or the parameters of what type of activities are protected under the Act.[28] Knowing the details of these rights under the NLRA can help employees keep their jobs.[29] In releasing the Advice Memoranda, the Board's Acting General Counsel Lafe Solomon proclaimed that the reports were to "encourage compliance with the Act and cooperation with Agency personnel" by "keep[ing] the labor-management community fully aware of the activities of [his] office.[30]

NLRB CASES ON SOCIAL MEDIA

Although the Acting General Counsel of the NLRB has provided guidance on social media in the workplace, it was not until the Board heard *Hispanics United of Buffalo* and *Karl Knauz Motors, Inc.* that it issued formal decisions addressing the use of social media to air work-related matters. [31] In both cases, the Board held that the discipline of employees for statements

[27] In person interview with Wilma Liebman conducted on November 3, 2013.

[28] Jeffrey M. Hirsch, "Making Globalism Work for Employees." 54 St. Louis U. L.J. 427 (2009).

[29] Ariana C. Green. "Privacy Law: Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity." 27 Berkeley Tech. L.J. 837, 885 (2012).

[30] First NLRB Report, August 18, 2011. *Available* at http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.

[31] On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit, in *Noel Canning v. NLRB*, invalidated President Obama's three January 4, 2012 recess appointments to the NLRB. The D.C. Circuit ruled that the three "recess" appointments to the NLRB are invalid because they exceeded the scope of the President's authority under the Recess Appointments Clause of the U.S. Constitution. The *Noel Canning* decision may affect all NLRB case decisions issued after January 4, 2012, which may in turn cause the Board to re-evaluate *Hispanics United of Buffalo* and *Karl Knauz Motors*.

about their workplace on social media are lawful and unprotected by the NLRA, unless those statements relate to pay, hours, safety, workload or other terms of employment or grow out of an on going labor dispute.

In the landmark NLRB case *Hispanics United of Buffalo, Inc.* (2011), the NLRB found that Hispanics United of Buffalo, a non-profit corporation that renders social services in Buffalo, New York, violated section 8(a)(1) of the NLRA by firing five employees for comments they posted on Facebook after learning that a co-worker criticized their work performance.[32] The Facebook rift ignited when employee Lydia Cruz-Moore texted fellow employee Marianna Cole-Rivera saying that she was going to tell their supervisor what a bad job Cole-Rivera and other Hispanics United of Buffalo employees were doing. Cole-Rivera responded:

> "Lydia Cruz, a coworker feels that we don't help our clients enough at [Employer]. I about had it! My fellow coworkers how do u feel?"

Four Hispanics United of Buffalo employees posted comments on Facebook in response to Cole-Rivera's initial posting. Cruz-Moore also commented on the post, telling Cole-Rivera to stop spreading lies, and then reported the incident to her supervisor. Cole-Rivera and the four employees who commented about Cruz-Moore were terminated for their Facebook activity. Upon review, the NLRB found these terminations to violate Section 8(a)(1) of the NLRA because although the employees never discussed bringing Cruz-Moore's comments to management, the employees were making a "common cause" with each other through their conversation on social media. The Board held that the employees were taking the "first step

[32] *Hispanics United of Buffalo, Inc*., 3 NLRB 27872 (2011).

towards group action to defend themselves."[33] Since Cole-Rivera's initial post could be interpreted as an appeal to her co-workers for assistance, the NLRB has made it clear that an employees' objective of group action does not literally have to be expressed during a conversation on social media for that employee's statements to be protected concerted activity.

This case is particularly interesting because the Board established an unprecedentedly broad definition of protected concerted activity. The NLRB determined that Cole-Rivera's comments on Facebook were protected, even though they suggested no intention of preparing group action. Perhaps the Board took the opportunity in *Hispanics United of Buffalo* to develop a new analytical framework with respect to employee use of social media in the workplace. For the first time, the NLRB has expanded the meaning of "concerted activity" to include a "possibility of group action," rather than limiting the Board's interpretation strictly to the text of the Facebook posts.

In *Karl Knauz Motors* (2012), Karl Knauz Motors owned both a BMW and Land Rover dealership located directly across the street from each other.[34] When the BMW dealership hosted an all-day event to introduce clients to a new model, the General Sales Manager told his salespeople that the dealership would serve hot dogs, cookies, and premade Costco snacks at the event. Concerned about the negative effect the cheap refreshments would have on clients, sales, and commissions, Karl Knauz Motors BMW salesmen Robert Becker posted mocking photos of co-workers posing with the food on his personal Facebook page. Another incident occurred five days later, when a salesperson allowed the 13-year-old son of a customer to sit behind the wheel

[33] Dill, Jesse. "NLRB issues Hispanics United Facebook firing decision." Arnstein & Lehr LLP. 9 Jan. 2013. 8 Apr. 2013. *Available* at http://general-counselor.com/2013/01/09/nlrb-issues-hispanics-united-facebook-firing-decision/>.

[34] *Karl Knauz Motors, Inc.*, 13 NLRB 46452 (2012).

of a Land Rover after a test drive. The boy apparently hit the gas, drove over his parent's foot, over a wall, and then into a pond. Becker posted a picture of the car in the pond on his Facebook, along with a caption criticizing his co-worker's decision to let the boy sit in the car. The Company's General Sales Manager asked Becker to remove the photos and comments, and Becker immediately complied. The following day, Becker was terminated for his posts related to the Land Rover incident.

The General Counsel concluded that Becker was engaged in concerted activity by posting the comments and photographs in regard to the sales event on his Facebook page. As noted, before the event, several employees were displeased with the planned food choices, and after the meeting, the employees discussed this frustration among themselves. Becker took photographs to document the event and capture his co-workers frustration. He told his co-workers that he would put the photographs on Facebook, and in doing so, expressed the sentiment of the group. The Facebook activity was a direct outgrowth of the earlier discussion among the salespeople that followed the meeting with management. Further, the General Counsel concluded that this concerted activity clearly was related to the employees' terms and conditions of employment. Since the employees' wages depended entirely on commissions, they were concerned about the impact the employer's choice of refreshments would have on their earnings. The employer, however, argued that Becker was terminated solely for his posts about the car driving into the pond rather than the sales event incident; Consequently, his discharge did not violate the Act.

ADMINISTRATIVE LAW JUDGE CASE

In *Triple Play Sports Bar & Grille* (2012), an ALJ for the Board found that even using Facebook's "Like" button might constitute as protected concerted activity under the NLRA.[35] In this case, Triple Play Sports Bar & Grille operated a sports bar and restaurant in Watertown, Connecticut. Jillian Sanzone was employed as a waitress and bartender, and Vincent Spinella worked as a cook. When Sanzone filed her tax returns, she realized that she owed taxes because of errors made by her employer. She talked about the tax issue with co-workers, and her supervisors arranged a staff meeting to address the issue. Before the staff meeting took place, a former employee of Triple Play made the following Facebook posting:

> Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!!

The posting received a number of responses from the employer's customers and former co-workers, including Sanzone who stated, "I owe too. Such [the Employer] an asshole." Although Spinella did not respond with a textual comment, he clicked the "Like" button under the initial posting. Triple Play terminated both Sanzone and Spinella due to their social media activity. Upon review, the ALJ focused on the fact that the Facebook postings were "part of an ongoing sequence of events" involving the tax issue, of which the employees of Triple Play had discussed before the Facebook activity. The ALJ concluded that Sanzone's comment in response to the initial Facebook post constituted protected concerted activity since her activity was "part of a sequence of events, including other, face-to-face employee conversations, all concerned with

[35] *Triple Play Sports Bar & Grille*, 34 NLRB 12915 (2012).

employees' complaints regarding Respondents' tax treatment of their earnings." With respect to the implications involving Spinella clicking the "Like" button instead of responding in text form, the ALJ held that the "Like" button "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity."

GENERAL COUNSEL ADVICE MEMORANDA CASES

As of May 2014, the NLRB and the ALJ have only decided three cases related to employee use of social media. However, the General Counsel has issued a great deal of advice on employee social media activity through analyzing some of the charges the Board has received. This segment explores a number of NLRB charges in which employee social media activity was found not to be protected concerted activity, or was so "egregious" to have lost the Act's protection.

While *Monmouth Ocean Hospital Service Corporation (MONOC)* (2009) was decided by the District Court of New Jersey, the General Counsel provided further comments on the case that supported the Court's reasoning. Monmouth Ocean Hospital Service Corporation is a non-profit company that operates 15 New Jersey acute-care hospitals.[36] In June 2009, the Professional Emergency Medical Services Association of New Jersey, the union that represented a unit of MONOC's emergency medical services employees, had been negotiating for their first contract but had not yet reached an agreement. Acting Union President and MONOC registered nurse, Deborah Ehling, used her personal Facebook page to post comments regarding bargaining and other union activities. Ehling was Facebook "friends" with Chris Dalton, a union member,

[36] *Deborah Ehling v. Monmouth-Ocean Hospital Service Corporation*, et al, 2012 WL 131926 (D.N.J. May 30, 2012).

and Ken Baker, a union delegate, who all engaged in a Facebook conversation, which indicated that they might withhold care if their patients personally offended them. An unidentified employee provided copies of the Facebook comments to MONOC management, and all three employees were given a two-week suspension. In response to charges that MONOC had engaged in unfair labor practices by disciplining the three employees, the General Counsel found that the employees' statements did not constitute protected concerted activity; Therefore, MONOC did not violate Section 8(a)(1) of the NLRA by disciplining employees based upon their Facebook posts.

In *Lee Enterprises, Inc*. (2011), a crime reporter for the Arizona Daily Star tweeted about murder victims on a work-related Twitter account.[37] Although the employer had no written social media policy for its employees, he encouraged its reporters to create Twitter accounts and to disseminate information to the public through social networking platforms. The employer found the crime reporter's tweets inappropriate and offensive, and fired the reporter. This case was submitted to the General Counsel for advice as to whether the employer violated Section 8(a)(1) by terminating the charging party for posting unprofessional and inappropriate tweets to a work-related Twitter account. The General Counsel concluded that the reporter's behavior was neither protected nor concerted because it did not relate to the terms or conditions of his employment, or seek to involve other employees in employment related issues.

In the case, *JT's Porch Saloon & Eatery, Ltd.* (2011), a bartender had a conversation with a fellow bartended in which he complained that their Employer, JT's Porch, maintained an unwritten policy that waitresses did not need to share their tips with the bartenders even though

[37] *Lee Enters., Inc*., Case 28-CA-23267, Advice Memorandum (Apr. 21, 2011).

they helped the waitresses serve food.[38] During the conversation both bartenders agreed that the tipping policy "sucked." However, none of the employees ever raised the issue with management. The bartender also had a conversation on Facebook with his stepsister. She had sent him a message asking how his night at work went, and he responded with complaints that he had not had a raise in five years and that he was doing the waitresses' work without tips. He also called the employer's customers "rednecks" and wrote that he hoped they choked on glass as they drove home drunk. A week after this Facebook posting appeared, the employee's manager left the bartender a voice message stating that he was fired for his Facebook posting about the Employer's customers. The General Counsel concluded that the employer did not violate Section 8(a)(1) because there was no evidence of concerted activity. Even though the bartender's posts were job-related, the General Counsel held that since none of his co-workers commented in response to the posting, and there had been no attempt to initiate group action with regard to the tipping policy or the awarding of raises, there was no evidence the employee engaged in concerted activity, and no basis for concluding that he was unlawfully fired.

The fourth case, *Martin House* (2011), involves the discharge of an employee for inappropriate Facebook posts that referenced the employer's mentally disabled clients.[39] Martin House, a non-profit residential facility for homeless people and those with mental illnesses, received a grant to develop a new residential program designed for residents who have more significant mental health issues. The charging party was employed as a part-time residential assistant and became a full-time recovery specialist in the new program. The charging party engaged in a conversation on her personal Facebook page while working on the overnight shift.

[38] *JT's Porch Saloon & Eatery, Ltd*., Case 13-CA-46689, Advice Memorandum (July 7, 2011).

[39] *Martin House.*, Case 34-CA-12950, Advice Memorandum (July 19, 2011).

The discussion read:

> *Charging Party*: Spooky is overnight, third floor, alone in a mental institution, btw Im not a client, not yet anyway.
>
> *Friend 1*: Then who will you tell when you hear the voices? to be right, either way we'll just pop meds until they go away! Ya baby!
>
> *Charging Party*: My dear client ms 1 is cracking up at my post, I don't know if shes laughing at me, with me or at her voices, not that it matters, good to laugh
>
> *Friend 1*: That's right but, if she gets out of hand, restrain her.
>
> *Charging Party*: I don't need to restrain anyone, we have a great rapport, im beginning to detect when people start to decompensate and she is the sweetest, most of our peeps are angels, just a couple got some issues, Im on guard don't worry bout a thing!
>
> *Friend 2*: I think you'd look cute in a straitjacket, heh heh heh ...

Neither of the commenting Facebook "friends" were co-workers; However, the charging party was "friends" with one of the employer's former clients who saw the postings and called the employer to report her concern. As a result, the Charging Party was fired on the grounds that the employer was "invested in protecting people we serve from stigma" and it was not "recovery oriented" to use the clients' illnesses for personal amusement. The Board concluded that the employer did not violate Section 8(a)(1) of the NLRA because the charging party did not engage in protected concerted activity, maintaining she did not discuss her Facebook posts with any of her fellow employees, and none of her coworkers responded to the posts. Moreover, the charging party was not seeking to induce or prepare for group action, and her activity was not an

outgrowth of the employees' collective concerns. In fact, her Facebook posts did not even mention any terms or conditions of employment. The charging party was merely communicating with her personal friends about what was happening on her shift.

In *Wal-Mart* (2011), an employee posted comments on his Facebook page that complained about working conditions at the organization. Even though the posts related to work-matters, the Board found the posts did not rise to the level of concerted activity necessary to invoke the NLRA's protections. The employee's post read,

> "Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!... [The Assistant Manager] is being a super mega puta! It's retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price… that's false advertisement if you don't sell it for that price… I'm talking to [Store Manager] about this shit cuz if it don't change walmart can kiss my royal white ass!"[40]

Certainly, the posts included criticism of terms or conditions of employment. According to the General Counsel, however, the posts did not constitute concerted activity because there was no evidence that the employee was doing anything more than expressing an "individual gripe." Moreover, only two other employees responded. Both responses—one asking why he was so "wound up" and another saying that he should "hang in there"—appeared to suggest that the employees saw his comments as asking for emotional support, rather than seeking to initiate group action. In the Advice Memorandum regarding the case, the NLRB wrote:

"Here, we conclude that the Charging Party's Facebook postings were an

[40] *Wal-Mart*, Case17-CA-25030, Advice Memorandum (July 19, 2011).

> expression of an individual gripe. They contain no language suggesting the Charging Party sought to initiate or induce coworkers to engage in group action; rather they express only his frustration regarding his individual dispute with the Assistant Manager over mispriced or misplaced sale items. Moreover, none if the coworkers' Facebook responses indicate that they otherwise interpreted the Charging Party's postings."

In *Children's National Medical Center* (2011), the General Counsel held that a respiratory therapist did not engage in protected activity when she posted comments on Facebook complaining about noises her co-worker was making while riding in an ambulance with a patient.[41] In the case, the employee in question was a respiratory therapist at a children's hospital in Washington, D.C., and in addition to her usual duties, was often assigned to the Transport Team, which transported patients to the hospital by ambulance. On one evening, the respiratory therapist was assigned to work Transport and was traveling by ambulance with the rest of the team to pick up a patient and bring her to the hospital. She was sitting in the back of the ambulance with a co-worker who was sucking his teeth during the ride to pick up the patient. The respiratory therapist found her co-worker's habit irritating and used her iPhone to post on Facebook: "REALLY!!!! Must you suck your teeth every 30 seconds. It is driving me nuts." Two of her Facebook "friends" who were not employees of the Hospital, responded with supporting comments. In reply, the employee wrote: "Actually they are about to get, beat senseless with a ventilator. It's in the back of an ambulance and I can't get away from them. UGH!!!" When the respiratory therapist's co-worker saw the Facebook post, he sent an e-mail to management the next day. The employer conducted an investigation and fired the employee due to her inappropriate Facebook posts. Upon review, the NLRB General Counsel argued that the

[41] *Children's National Medical Center*, Case 05-CA-36658, Advice Memorandum (Dec. 1, 2011).

respiratory therapist's post was unprotected because it did not address terms and conditions of employment. The employee was merely complaining about the irritating sounds her co-worker was making during the transport that evening and did not suggest that the Employer should do anything about it. Therefore, her complaint about her co-worker's noises and threat to hit him with a ventilator were not protected by the NLRA. Similarly in *Copiah Bank* (2011), a bank teller vented her workplace frustrations on Facebook and called her co-workers "idiots" and "narcs" after having been questioned by her supervisor about her work.[42] The Bank teller was then terminated for her Facebook posts. The General Counsel agreed that the employee had not engaged in protected concerted activity when she posted her comment on Facebook and therefore the employer did not violate the Act by discharging her. The bank teller admitted that she was not speaking on behalf of any other employees, nor was there evidence that she was looking to group action when she posted her comments on Facebook.

In *Frito-Lay, Inc.* (2011), the Division of Advice found that an employee had not engaged in concerted activity when he used Facebook to post, "I think they are trying to give me a reason to be fired because I'm about a hair away from setting it off in that BITCH. hahahaha."[43] The Company's Human Resources manager suspended and subsequently fired the employee because his "Facebook comments were inappropriate, threatening and violent." Upon review, the General Counsel concluded there was no evidence of concerted activity, and declared that "although the [employee's] postings addressed his terms and conditions of employment, he did not seek to initiate or induce coworkers to engage in group action, and none of his coworkers responded to the postings with similar concerns."

[42] *Copiah Bank*, Case 15-CA-061204, Advice Memorandum (Dec. 1, 2011).

[43] *Frito-Lay, Inc*., Case 36-CA-10882, Advice Memorandum (October 11, 2011).

In *Rock Wood Fired Pizza & Spirits* (2010), employee Janelle Morehart took to Facebook to post concerns about a new fellow bartender at Rock Wood Fired Pizza & Spirits, claiming he was a "cheater" and "screwing" customers because he was using mixes instead of premium liquors. Morehart's comments stated, "Dishonest employees along with management that turns their head, will be the death of any business."[44] Morehart is Facebook "friends" with other employees at Rock Wood Fired Pizza & Spirits, who were concerned that customers would see the posts. Morehart was subsequently fired for the comments she made on Facebook. The General Counsel concluded Morehart's activity was not protected under the NLRA because the comments were not directed to other employees nor were they about the terms of employment.

THE LEGALITY OF EMPLOYER SOCIAL MEDIA POLICIES

The NLRB's General Counsel has also issued guidance on company social media policies, specifically addressing policy provisions that may unreasonably interfere with protected concerted communication under the NLRA. Since it is not always clear which types of social media policy provisions may or may not restrain Section 7 activity, understanding the Board's opinion on communication policies will minimize the likelihood that future employers will implement provisions that are outside the boundaries of labor law. Over the course of analyzing corporate social media policies, the Board has issued two decisions in *Costco Wholesale Corp.* (2012) and *Target Corp.* (2013). These two cases are significant for all employers because they provide guidance regarding what types of social media work-rules are unlawful under the NLRA.

[44] *Rock Wood Fired Pizza & Spirits*, Case 19-CA-32981, Advice Memorandum (September 19, 2011).

In the Costco case, the NLRB examined Costco's "Electronic Communications and Technology Policy," which provided that:

> "Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation or violate the policies outlines in Costco's Employee Agreement, may be subject to discipline, up to and including termination of employment."

Upon review the NLRB partially reversed an ALJ's decision, and held that Costco's policy violated Section 8 of the NLRA because it was overbroad and "would reasonably tend to chill employees" in their exercise of their rights to engage in concerted activity. The Board explained that even though an employer policy provision may not explicitly restrict an employee's Section 7 rights, work-rules might still violate the NLRA upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; and (3) the rules had been applied to restrict the exercise of Section 7 rights. In the *Costco Corp*. case, the NLRB found that Costco employees could reasonably conclude that the social media policy prohibited them from engaging in protected communications because it contained a broad rule that could reasonably be construed to restrict Section 7 activities such as communications.

In the *Target Corp*. case the Company's social media policy read,

> "If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note there are guidelines to follow if you plan to mention Target or your employment with Target in these online vehicles: Don't release confidential guest

> [customer], team member or company information… including any video footage… Do not harass or make any threats to guests or team members."

The ALJ found, and the Board agreed, that the policy violated employees' Section 7 rights to discuss their wages, hours, and working conditions because it was overly broad. The ALJ found provisions prohibiting Target employees from releasing any company information to be unlawful because it could be interpreted as forbidding employees from discussing their wages and conditions of employment with each other. Target Corporation appealed the ALJ's decision, and upon review, the NLRB upheld the ALJ's decision and order, and ordered Target to cease and desist from maintaining an information security policy prohibiting employee discussions on wages, benefits and other terms and conditions of employment.

GENERAL COUNSEL ADVICE ON SOCIAL MEDIA POLICIES

NLRB Acting General Counsel Lafe Solomon has provided the most guidance to employers who are crafting policies that might tend to interfere with protected concerted communication under the NLRA. Though case-analysis, General Counsel Solomon discusses the different types of social media policy provisions that run afoul the NLRA, and how employers can craft work-rules that respect employee Section 7 rights. The General Counsel found that in *Wal-Mart*, the Company's two-page social media policy gave employees clear notice of prohibited behavior "without burdening protected communications about terms and conditions of employment." Wal-Mart's well-crafted social media policy undoubtedly provides a helpful starting point for employers developing work-rules to guide employee use of social media in the workplace.

Flagler Hospital (2011) is one example of an organization that maintained a social media policy that the General Counsel found to be unlawful because it included a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights."[45] Flagler Hospital maintains an acute care hospital in St. Augustine, Florida. In this case, Flagler Hospital issued a "Social Media, Blogging and Social Networking" policy, which was then incorporated into the Company's Employee Handbook. Kathleen Reichle and several fellow nurses assigned to the Hospital's OR recovery room were unhappy with one of their co-workers who was frequently absent from duty, creating extra demands on their time and workload. Although Reichle and the others had complained to their manager about their frustration, no action had been taken to rectify the matter.[46] After the nurse called in sick again, Reichle posted a comment on her Facebook page complaining about her colleague, stating that the nurse "totally disrupted" and "really screwed" the OR recovery room that weekend. Reichle's post ended with "anymore details, contact me." Reichle had approximately 50 friends on Facebook who were employed by Flagler Hospital, four of whom also worked in the OR recovery room. Reichle was later called to the Company's Human Resources department and was terminated for violating the Hospital's social media policy.

Reichle filed a charge alleging that Flagler Hospital violated Section 8(a)(1) of the NLRA by discharging her for engaging in protected concerted activity; However, Reichle withdrew the charge after the NLRB Regional Director concluded that because she was a Section 2(11)

[45] Advice Memorandum from the NLRB Office of the Gen. Counsel to Rochelle Kentov, Regional Director of Region 12, Flagler Hospital, No. 12-CA-27031. May 10, 2011. *Available* at http://mynlrb.nlrb.gov/link/document.aspx/09031d45806bab9c.

[46] Advice Memorandum from the NLRB Office of the Gen. Counsel to Rochelle Kentov, Regional Director of Region 12, Flagler Hospital, No. 12-CA-27031. May 10, 2011. *Available* at http://mynlrb.nlrb.gov/link/document.aspx/09031d45806bab9c.

supervisor under Board law, her social media activity would not be protected under the NLRA. Reichle filed another charge alleging that certain provisions of the employer's social media policy are unlawful. The employer's "Social Media, Blogging and Social Networking" policy read:

> "No 'tweet', blog or social networking page or site may in any way violate, compromise, or disregard the… rights and reasonable expectations as to privacy or confidentiality of any person or entity…Any communication or post which constitutes embarrassment, harassment or defamation of the Hospital or of any Hospital employee, officer, board member, representative or staff member, including members of the medical staff, is strictly prohibited…Any conduct, behavior or form of expression which, under the law, is or may be impermissible if expressed in another form or forum is likewise impermissible if expressed through any social networking media, blog or social networking site or page. This includes any statements which lack or are reckless as to truthfulness or which might cause damage to or does damage the reputation or goodwill of the Hospital, its staff or employees in the community or otherwise."

The Board concluded that Flagler Hospital's social media policy was "overly broad as employees could reasonably construe them to prohibit protected conduct." First, the rule that prohibited employees from using any social media that "may in any way violate, compromise, or disregard… the rights and reasonable expectations as to privacy or confidentiality of any person or entity," was not specific enough for employees to conclude what was or was not acceptable communication on social media. Since the Hospital did not provide a clear definition or guidance as to what it considered to be private or confidential, the General Counsel concluded that the rule could be interpreted as prohibiting protected employee discussion of wages and other terms and conditions of employment. Second, the NLRB's Office of the General Counsel considered the rule that prohibited "statements which lack… truthfulness or which might cause damage to or

does damage the reputation or goodwill of the Hospital" to be ambiguous because its terms could be applied to protect criticism of the Hospital's labor policies or treatment of employees. Third, the Board analyzed the Employer's use of a savings clause, stating its prohibitions were limited to conduct "or form of expression which, *under the law*, is or may be impermissible." The Board explained that "these general provisions, known as savings clauses or disclaimers, that employers tack onto the end of a rule that otherwise prohibits, coerces, or retrains employees in the exercise of their Section 7 rights, do not make an otherwise unlawful rule lawful."

Similarly, in *EchoStar Technologies* (2012), the NLRB determined that the Company's social media policy could be reasonably interpreted to interfere with the right of employees to engage in protected concerted activity, even though it implemented a savings clause. The policy stated,

> "You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/ services. Remember to use good judgment. Unless you are specifically authorized to do so, you may not: Participate in these activities with EchoStar resources and/or on Company Time."[47]

In this case, the Board held that the policy's savings clause "use your good judgment" was insufficient to notify employees that the questionable provision did not apply to protected concerted activity under Section 7. EchoStar's policy provisions could be viewed as restricting employees from commenting on the terms and conditions of their employment online.

[47] *EchoStar Technologies*, Case 27-CA-066726 (2012).

The Board continued to release additional guidance on employers' social media policies when it concluded in *DISH Network* (2012) that the Company's "Social Media" policy violated the Act by requiring employees to obtain prior authorization from management before speaking about the company to the media or at a public meeting.[48] The Company's policy was as follows:

> "DISH Network regards Social Media—blogs, forums, wikis, social and professional networks,…as a form of communication…When the company wishes to communicate publicly… it has well-established means to do so. Only those officially designated by DISH Network have the authorization to speak on behalf of the Company through social media. You may not make disparaging or defamatory comments about DISH Network, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their, products/ services. Unless you are specifically authorized to do so, you may not participate in these activities with DISH Network resources and/or on Company time."

In this case, the NLRB held that DISH Network's policy prohibiting employees from making disparaging comments about the company on social media sites is unlawful because a reasonable employee could construe the rules to chill their right to engage in protected activity. The Board also concluded that although the Employer, DISH Network may have a legitimate desire to control the message it communicates to the public, this rule would prohibit employees from speaking to government agencies and regulators as well, which would restrict employees from their protected right to converse with the NLRB regarding working conditions.

Wal-Mart's social media policy, however, passed the Board's muster by providing specific examples of the types of employee conduct that is or is not protected concerted activity. In his third Office of Advice Memorandum, the General Counsel found that Wal-Mart Stores

[48] *DISH Network*, Case 16-CA-066142 (2012).

Inc. avoided an unfair labor practice when it adopted a revised social media policy for its employees, which is both unambiguous and lawful. Wal-Mart's social media policy reads:

> "The same principles and guidelines found in Wal-Mart policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of Wal-Mart or Wal-Mart's legitimate business interests may result in disciplinary action up to and including termination."[49]

The General Counsel ruled that Wal-Mart's policy is not ambiguous because "it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity." In essence, since Wal-Mart included examples of clearly unprotected and protected conduct, employees would be able to reasonably construe whether their posts on social media would cover protected activity.

RISKS AND BENEFITS OF SOCIAL MEDIA IN THE WORKPLACE: A HUMAN RESOURCES PERSPECTIVE

The explosion of social media has left many businesses grappling with the ways in which to use such platforms. A 2009 Deloitte LLP study revealed that 23% of employees visit social networking websites one to four times per week while at work.[50] In the same study, 10% of those employees admit that some access was for personal reasons, 74% of employees agreed it is easy

[49] *Wal-Mart*, Case No. 11-CA-067171 (2012).

[50] Deloitte LLP, *2009 Ethics & Workplace Survey Results, Social Networking and Reputational Risk in the Workplace* (2009). *Available* at https://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf.

to damage a company's reputation on social media, and 23% of employees said they do not consider the ethical consequences of posting comments, photos, or videos on the Internet. In a 2011 survey administered by the Society for Human Resources Management (SHRM), 31% percent of employers track employee use of social media services, and 43% block all access to social media platforms on organization-owned computers or handheld devices.[51] According to Professor Lisa Dragoni at Cornell University's School of Industrial and Labor Relations, before a modern-day employer implements a ban or restriction on the use of social networking platforms like Facebook and Twitter in the workplace, organizations must first understand the value of the potential benefits weighed against the legal and public relations risks.[52]

A common concern amongst human resources professionals and business executives is the use of social media by employees and the effects this may have on an organization's image. Many companies are afraid of what their employees may write about their workplace on social media, which in turn, may influence how existing or potential customers perceive the organization. While it is undoubtedly beneficial for an organization to have employees discuss new corporate initiatives on their personal social media profiles, employees typically take to social media to discuss work-related issues after having faced hardship at the workplace.

Although modern day employers are often aware of the benefits and risks associated with social media in the workplace, according to a study conducted by Spherion, less than 50% of today's organizations have a formal social media policy for employee and corporate social media

[51] Savitt, Michael P. "Social Studies." HRO Today, Vol. 11 No. 1. January/ February 2012. *Available* at http://www.hrotoday.com/content/5074/social-studies.

[52] In person interview with Professor Dragoni was conducted on January 30, 2013.

initiatives.[53] Failing to create a comprehensive corporate social media policy can create risks for employees who take to Facebook and Twitter to discuss work-related matters without knowing the organization's stance on social media or an understanding of federal labor law. After having developed a comprehensive social media policy, it is essential that the policy be easily accessible to all employees.

In response to the NLRB's guidelines on crafting appropriate corporate social media policies, the Cornell University School of Industrial and Labor Relations, in conjunction with eCornell, developed an online certificate program titled "Designing and Implementing Effective Social Media Policy."[54] Managing Director of Cornell's Center for Advanced Human Resources Studies (CAHRS), Steven Miranda helped create and teach this two-week course particularly for human resources professional and line managers. The course offers strategies on how organizations can identify current and potential uses of social media in their workplaces, recognize the process and resources needed to implement and maintain a social media policy, and develop a comprehensive social media strategy that does not restrict employee Section 7 rights. By providing this type of training, Cornell University has contributed to teaching modern managers how to assess risk in creating a social media policy, as well as how to educate employees on protected concerted activity as it relates to social media.

Although there is no one-size-fits-all approach to forming a social media policy, a comprehensive and well-defined policy should be established to prevent confusion about an

[53] Ployhart, Robert. "Social Media in the Workplace: Issues and Strategic Questions." Society for Human Resources Management. 2012. *Available* at https://www.shrm.org/about/foundation/products/Documents/Social%20Media%20Briefing-%20FINAL.pdf.

[54] ILRHR561: Designing and Implementing Effective Social Media Policies. E-Cornell course taught by Professor Steven Miranda.

organization's business strategy. Essential elements of a social media policy should include a defined purpose for the policy, a clear platform for educating employees, and an array of examples to illustrate types of statement's that are protected versus unprotected under the NLRA. When creating a social media policy, employers should be specific, as a poorly drafted or overly broad policy could leave employers subject to liability for potentially violating employee rights. Social media policies should also make it clear that certain online speech related to working conditions is concerted activity under the law. However, that does not include personal complaints or gripes, nor does it protect an employee's offensive, defamatory or inappropriate remarks. Employers should also educate their employees about the company's social media policy, and make it readily available in an employee handbook. In addition, employers should instruct human resources associates to treat employees' work-related social media comments with the same seriousness as workplace complaints.[55] By doing so, employers can mitigate the risks associated with employee's online conduct.

SOCIAL MEDIA AND UNIONS

The power of new media is undeniably strong, and through platforms like Facebook and Twitter, labor unions have the ability to engage in intimate, personal conversations with hundreds, if not thousands of members, potential members and supporters.[56] By forming a presence on social media, unions have access to a powerful platform to present their views and inform the public on labor campaigns and struggles, areas that many unions have not had great success when relying solely on traditional forms of media. Through social media, unions are no

[55] Lanham, John R. "Social Media and the Workplace." Morrison & Foerster LLP. January 2010.

[56] White, Alex. "Social Media for Unions." Aleithia Media and Communications. December 2010. *Available* at http://alexwhite.org/2011/06/top-social-media-tips-for-unions/.

longer limited by geographic boundaries, as they can now campaign both locally and globally, all the while engaging individuals from a variety of demographics. In addition to those advantages, social media is even more cost effective than traditional media, since sending mass messages on social media is free and can be tailored to a segmented audience. Creating a presence on Facebook and Twitter should no longer be considered as just an afterthought, but rather as a necessary supplement to union newsletters, magazines, websites and face-to-face communication. This segment will discuss how unions are using social media to connect and promote dialogue with members and the public, as well as educate members on the opportunities and risks associated with social media, and mobilize them to rally towards supporting an issue.

In the private sector, employee use of social media is held to a very narrow interpretation of legal doctrines and precedent. Public sector employees, on the other hand, have broader protections regarding the use of social media than their private sector counterparts. One crucial distinction between the two sectors is that public sector employees are less likely to be at-will and more likely to have just cause provisions in their contracts, as well as state civil service systems. Similar to the NLRB's role in investigating and remedying unfair labor practices in the private sector, state level public employment relations boards define the rights and limitations of public employees. While the NLRB has developed a heightened awareness of employee use of social media in the workplace, state level public employment relations boards or their equivalents have not yet adopted clear policies regarding social media. Nonetheless, public sector unions have begun to conduct training sessions to teach members about the opportunities and potential legal risks associated with their use of social media. The California Teachers Association (CTA) is one public sector union that has assumed a proactive approach to educating

its members on appropriate social media activity in response to a number of disciplinary actions against member social media communications. As the largest affiliate of the National Education Association (NEA), the CTA has offered three social media training workshops for its members over the past two years. Michelle Washington, the union's Primary Contact Staff Representative, is responsible for conducting the union's social media training workshops. In an interview with Washington, she shared that since the school district unilaterally determines each school's technology policy, "the union is always reminding its members to be cautious of their online postings through workshops at the local level, and includes reminders in the union newsletter that inappropriate use of social media may cause [disciplinary] problems."[57] While Washington does not discourage teachers from using social networks, she offers her members simple suggestions to protect their role as an educator. Washington urges members to limit their social media profiles to "friends only" and refrain from joining groups that are unprofessional or inappropriate.

The Washington State Council of Fire Fighters (WSCFF) is another public sector union that offers members educational programs on employee use of social media through its annual Educational Seminar titled "Free Speech and Social Media." In an interview with the WSCFF's Executive Assistant Helen Kramer, she explained that the union's social media education class is taught by a third-party attorney who informs members about Washington state law or local ordinances as it relates to social media.[58] Since the Washington State Public Employment Relations Commission has yet to issue guidance on social media as it relates to public sector employees, members are taught social media legislation from the state-level. Similarly, the Civil

[57] Phone interview were conducted with Michelle Washington on February 27, 2014 and March 7, 2014.

[58] E-mail interviews were conducted with Helen Kramer on April 23rd and 24th, 2014.

Service Employees Association (CSEA), Local 1000 of the American Federation of State, County and Municipal Employees (AFSCME), is another public sector union that has been continuously educating its members on appropriate social media use at the workplace.[59] Eric Wilke, the CSEA Senior Associate Counsel, is in charge of teaching the union's educational programs. In an interview with Wilke, he shared that he educates his members on what he calls "smart social media." Wilke emphasized that since the New York State Public Employment Relations Board has yet to issue a decision on social media, he stressed that conducting training workshops prevents his members from becoming the first to create public sector case law. The CSEA's strategy is to provide intensive social media workshops to high-level officials and shop stewards, and to urge those officials to relay what they learned to their rank-and-file members.[60]

Introducing social media training workshops is one way unions can educate their members on social media etiquette. Through the use of clear examples, members should be taught what the difference between protected and unprotected communication is on a social media platform. With this knowledge, employees can engage in social media activity without fear of retribution. Unions can also better protect members by engaging in collective bargaining over company social media work-rules. Based on my interviews with unions, it is apparent that most, if not all, unions have yet to formally negotiate over social media policy provisions regarding employee communication on Facebook and Twitter. Former General Counsel of the NLRB Ronald Meisburg foresees that "parties will soon begin to collectively bargain over social

[59] Civil Service Employees Association (CSEA) is also Local 1000 of the American Federation of State, County and Municipal Employees (AFSCME).

[60] Phone interview was conducted with Eric Wilke on March 18, 2014.

media policies."[61] According to Section 8(a)(5) of the NLRA, it is unlawful for an employer to refuse to bargain in good faith over wages, hours, and other conditions of employment with the representative selected by a majority of the employees in a unit appropriate for collective bargaining. Meisburg drew upon the Section to illustrate that employee use of social media in the workplace falls under the realm of "other conditions of employment," and is thus a mandatory subject of collective bargaining. Kate Bronfenbrenner, Director of Labor Education Research at Cornell University's School of Industrial and Labor Relations, argues that parties may not come to the table to collectively bargain over company social media policies because "parties do not want to bargain over something that's in the law." Since employees have a legal right to engage in protected concerted activity, Professor Bronfenbrenner reasons that any employee unlawfully punished for communicating on social media has the right to grieve the discipline: "What good would bargaining over the policy serve if employee concerted activity is already protected, and employees would have to go through the same grievance procedures if unlawfully punished for protected activity on social media?" she asks. While federal labor law protects employees from retaliation due to social media activity, unions should still bargain over social media policies to ensure that those work-rules adhere to the guidelines set forth by the NLRB.

While only a few unions offer educational programs related to social media, many have begun to use Facebook and Twitter to ignite innovative campaigns and to support other unions in their labor struggles. One example of a union that has used the powerful tools of social media to shed light on a labor strike is the National Union of Workers ("NUW"), a union of 90,000 workers in Melbourne, Australia. Through social media, the NUW has used social media to send messages of solidarity from across the world to their brothers and sisters locked-out of a

[61] Phone interview was conducted with Ronald Meisburg on January 30, 2013.

Kellogg's plant in Memphis, Tennessee. During the 2014 Harvard Trade Union Program, I coordinated the Program's 44 participants taking part in a video, taped by NUW's Assistant Victorian Secretary Gary Maas, urging the participants to leave messages of solidarity to the Kellogg's workers during the lockout. The tape was then edited into a four-minute video featuring union leaders from a variety of trades, living in different parts of the world, supporting a common cause. The Bakery, Confectionery, Tobacco Workers and Grain Millers' International Union (BCTGM), the union that represents workers at Kellogg's, has not only featured the video on their International website, but has also used the footage during contract negotiations to pressure Kellogg's to come to an agreement. The video has over 900 views on YouTube, and has been shared countlessly on Facebook.[62] While the BCTGM is still in the process of contract negotiations, the video may be one way the union can reclaim an upper hand at the bargaining table.

The United Food and Commercial Workers International Union (UFCW) is another union that uses social media in an innovative way to connect with potential members and general supporters through its Organization United for Respect at Walmart (OUR Walmart) campaign, a movement to help Walmart associates to join together to gain more respect on the job.[63] In an interview with the UFCW's Senior Digital Communications Coordinator Jamie Way, she shared that ever since OUR Walmart launched in 2011, social media has been used as the campaign's primary amplification tool.[64] Since the campaign has enjoyed great success in its social media

[62] Kerin, Emma. "Kellogg's workers: solidarity from Harvard." YouTube Clip. Jan. 23, 2014. *Available* at https://www.youtube.com/watch?v=Lfy51TjOwGc

[63] More information on OUR Walmart *available* at http://forrespect.org

[64] Interview with Jamie Way conducted on April 22, 2014.

efforts, the UFCW has created a paid team of staff members who are responsible for posting on the union's social media profiles to engage Walmart employees who want to mobilize and stand up for change at their workplace. After an initial contact on social media, the team of staff members then uses the private messaging feature on social media to pull interested individuals into a deeper conversation to discuss how they can become involved in OUR Walmart. In an interview with Ron Mattock, UFCW's National Field Director, he shared that from the success of the OUR Walmart's campaign on social media, the UFCW has begun to offer training workshops to educate local staff representatives on the power of using social networking platforms to connect with potential members.[65]

Perhaps one of the most innovative and successful contact campaigns driven by social media was the 2012 Chicago Teachers' Union (CTU) strike, in which thousands of Chicago teachers walked off the job to protest an extended school day and tying students' standardized test performance to teacher evaluations.[66] CTU's Social Media and Video Director Kenzo Shibata used social media to empower the union's members to become "citizen journalists" by capturing moments throughout the strike through photos and videos and "sharing" them on their personal Facebook profile. Since the first day of its social media campaign, CTU promoted the hashtags #CTUStrike and #FairContractNow through email blasts and word-of-mouth, which

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[65] Interview with Ron Mattock conducted on April 29, 2014.

[66] Chicago teacher strike for the first time in 25 years after contract talks fail." Fox News. 10, Sept. 2012. *Available* at http://www.foxnews.com/us/2012/09/10/chicago-teachers-to-go-on-strike-after-talks-with-district-fail/

later became two of the top trending hashtags on Twitter.[67] The union also produced a video of rank-and-file members on the picket line singing an adaptation of the hit pop song "Call Me Maybe."[68] The video has over 38,000 views on Youtube, and thousands of video commentary from people around the world leaving messages of solidarity. In an interview with Robert Bruno, Director of Labor Education Program at the University of Illinois at Urbana-Champaign, Bruno shared that while there may not be a formula to calculate the power social media played in the 2012 CTU strike, the union used social media in an unprecedented way to share its story with people throughout the city, nation and world.[69]

While the Communication Workers of America (CWA) has yet to use platforms like Facebook and Twitter to supplement a campaign, social media plays a large part in the union's ability to organize and mobilize its members towards political action. Through social media, the CWA shares news, promotes events, and encourages people to engage in online actions like sending letters to members of Congress and signing petitions. CWA Director of Online Communications Beth Allen believes that while social media will never diminish the importance of face-to-face contact with members, platforms like Facebook and Twitter serve as the primary way members share information and connect.[70] The CWA has experienced such an enormous amount of success with social media that the union has even stopped producing its printed newsletter. Instead it uses Facebook to push-out information that would have been sent to its

[67] "Social Media Workshop." Rutgers School of Management and Labor Relations. 2013. *Available* at http://smlr.rutgers.edu/labor-studies-employment-relations/social-media-workshop

[68] Desgrosellier, Nikki. "When there's a contract, then call us maybe." YouTube Clip. Sept. 13, 2012. *Available* at https://www.youtube.com/watch?v=SqXmX5caH7k

[69] Phone conversation with Professor Bruno was conducted on March 24, 2014.

[70] E-mail Interview with Beth Allen conducted on April 25, 2014.

members through conventional postal delivery services. Allen noted that while the union's online advertising budget has increased, this cost is a fraction of what the union would spend on postal mail. Thus, social media may not only be a more effective tool for establishing accountability between a union and the public, it may also be more cost effective and simpler than traditional methods.

Social media can also be used to assist a union in its ability to attract media attention, as well as to combat negative press. Karen Hickey, Communications Director at the Wisconsin State AFL-CIO, has directed three social media training programs for rank-and-file members as a way to effectively create media attention by educating members on how to update their social media profiles to engage the general public on union activities. "We don't always get the type of [media] attention we are looking for," Hickey shared, "but I tell my members to take pictures and videos anyway so we can upload them onto Facebook."[71] Through the training program, Hickey teaches members how to disseminate information and grasp media attention through the use of social media. With the right approach, however, unions can not only use social media to create a spot light on union activities, but also to turn a potentially negative situation around. Through social media, unions can respond quickly when faced with negative press to take control of the situation, and present a collective truth. Social media sites like Facebook and Twitter can be used as a platform to address the situation, letting members and the public know that you are well aware of the situation.

[71] Phone interview with Karen Hickey conducted on April 28, 2014.

The Service Employees International Union (SEIU) conducts 3-day boot camps educating its professional communicators at the local level on how to use social media to engage in online organizing and relay its views to the general public. Through the workshop, communicators are taught how to protect their membership's information on the Internet, engage in online advertising, live tweet, and craft Facebook and Twitter mass-messages that engage supporters without becoming overly intrusive. According to Alvin Velazquez, Associate General Counsel at the SEIU, communications directors should be very astute when using social media platforms to disseminate information, since flooding members and supporters with posts often distracts individuals from following a union's social media profile.[72]

Although social media platforms often allow unions to foster direct communication with their members, it is crucial to acknowledge that a presence on social media may not be for every union. The Seafarers International Union of North America (SIU) is one example of a union that does not place an emphasis on social media due to the nature of its workplace. The work of a seafarer often requires members to be at sea for months at a time, where the price of Internet bandwidth is very expensive. In an interview with the SIU's Communications Director Jordan Biscardo, he emphasized that even though the SIU maintains a Facebook and Twitter account, "we [the union] keep the material on our social media [profiles] light." Biscardo stressed that since members often do not access the Internet, the union's newsletter is still the dominant venue for information exchange. The United Mine Workers (UMW) is another union that loosely maintains a social media presence due to the nature of their member's jobs. In an interview with the UMW's Communications Specialist Emily Harris, she disclosed that miners typically work underground for roughly twelve hours a day, where workers do not have the ability to check their

[72] Phone Interview with Alvin Velazquez conducted on April 29, 2014.

Facebook on the job. Harris shared that the union's social media platforms was not created with the intension of using it to communicate with members, but rather to establish dialogue with member's children who may have an interest in becoming a future mineworker. The Directors Guild of America (DGA) is a unique union that has no presence on social media. Although the union has a frequently updated website, it does not use Facebook or Twitter to engage in conversations with members or supporters, and according to the union's Assistant Executive Director for Communications Sahar Moridani, the DGA has no plans to do so in the future. The DGA, a union with roughly 15,000 members, has found that communicating through e-mail and the union's website to be effective in interacting with members and informing them of union activities. Although the DGA's membership consists of seasoned individuals who may not be familiar with social media, the union may be best served by building a presence on social media based on the success of other unions that have used Facebook and Twitter even though there was a potential inability to connect with existing members.

Unions that do not have a presence on social media because they find navigating these platforms tricky and confusing can find assistance from the International Labor Communications Association (ILCA), an organization consisting of volunteers who are dedicated to working with unions to develop profiles on social media. Through training workshops, the ILCA not only helps unions set up a Twitter of Facebook account, but also teaches them how to upload photos, shoot and edit videos, and conduct interviews that will engage members and make the public stop and take a look. In an interview with the ILCA's President Kathy Cummings, she explained that international unions are doing a good job using social media to disseminate messages that may not appear on a traditional union newsletter or magazine. While President Cummings

acknowledges that social media has contributed to the enhancement of the labor movement, "when you drill down into the locals, there is still a lot of work to be done." Since many locals lack professional communication skills or public relations specialists, third party labor communicators like the ILCA are an invaluable resource to help develop a greater presence on social media. Similarly the New York City Central Labor Council, a non-profit labor membership organization devoted to supporting and advocating for the working people of New York City, offers trainings on digital strategies and online communications for staff members seeking to become better at using social media. In an interview with Sean Mackell, the Central Labor Council's Program Coordinator, he emphasized that trainings are geared toward communications staff and activists in their local union affiliates who would benefit from more expertise in online communications. These educational workshops cover topics ranging from graphic design to ways in which new media can be used as a vehicle for growth.

Many public sector unions have also begun to use social media as a dominant tool to connect with members and broadcast their message to the general public. The American Federation of State, County and Municipal Employees (AFSCME) is an example of a union that relies heavily on social media to connect with its members, especially its younger activists. AFSCME's Next Wave, Next Up and The Young Workers Summit have been three opportunities for activists' age 35 and younger to engage each other about leading AFSCME into the future. In an interview with Carmen Flores, Chair of AFSCME's Next Wave Counsel Committee for District 37 in New York City, she stressed that for each of these conferences, the union placed a large emphasis on social media to recruit and connect with young activists. Flores shared that the success of these conferences was largely due to social media, since these

platforms allowed "them [young activists] to feel that they were being heard." Through Facebook and Twitter, AFSCME encouraged young activists to ask questions, sign-up for conferences, and share the information they learned with their friends and family. Flores has found that contacting young activists through social media has brought about a quicker response rate than using traditional forms of media or scheduling in-person meetings. The International Association of Fire Fighters (IAFF) is another public sector union that relies heavily on social media to connect with young individuals who are interested in becoming firefighters. The IAFF's strong presence on Facebook and Twitter, as well as other platforms like Google+, Flickr and Youtube, is evidence of how strongly the union believes in the power of social media. According to Mesha Williams, the IAFF's Social Media Coordinator, the union uses their various social media accounts not only to connect with members, but also to promote unity among locals.

The Amalgamated Transit Union (ATU) is about to use social media platforms to launch a comprehensive campaign that highlights the important role public transit plays in creating stronger, cleaner and healthier communities. The campaign seeks to reach out to members and the public to follow the union on Twitter and to tweet why public transit is so great, using the hashtag #transit >. Individuals will be encouraged to send a tweet if they believe using transit is greater than driving a car because, for example using mass transportation decreases traffic pollution and creates jobs for bus drivers. In an interview with David Roscow, Assistant to the ATU's President for Communications, he shared that the campaign serves as an opportunity for people to remind themselves of the important role transit plays in our communities, which he hopes will place public transportation issues back into the legislative spotlight.[73] Although the

[73] Phone interview with David Roscow conducted on April 22, 2014.

ATU maintains a mid-size Facebook and Twitter following, this will be the first time the union uses social media for political action. Roscow anticipates that the campaign will excite and mobilize people, and ultimately call for more funding for public transit.

Social media is a very powerful tool, and labor unions must understand how to use its raw power to have intimate conversations with members, potential members and supporters around the world. When used to disseminate information about strikes, unfair labor practices and bad company policies, social media can galvanize the community and promote the union's dialogue at almost no cost. A well-developed social media strategy can give unions the ability to mobilize members, deal with negative press issues, as well as to drive innovative contract campaigns. While conventional forms of media and face-to-face conversations between organizers and potential members are essential, social media should be perceived as a supplement that acts as a powerful megaphone to enhance those traditional media strategies. Moreover, when it comes to the strategic use of social media, unions do not have to adopt a trial-and-error approach, as they can benchmark their union's social media presence against other unions that have had much success in using social media to create dialogue with members and the public, as well as to generate innovative campaigns. Although social media were adopted by most of the unions I studied, none indicated that they observe other unions for best practices and ways to improve. Benchmarking the best social media practices can give unions a comprehensive view of how one union's presence on Facebook and Twitter measures relative to another. The fact is that when unions do not benchmark, they miss opportunities and room improvement that can impact the success or failure of a union's presence on social media.

While I cannot predict how social media will continue to be used by labor unions, the

ever-changing world of electronic communication has the potential to create enormous possibilities in the not so distant future. According to the Government Paperwork Elimination Act (GPEA), federal agencies, including the NLRB, are required to treat electronic signatures as equal to handwritten signatures. Alvin Velazquez, Associate General Counsel at the SEIU, acknowledged that social media platforms may be the key ingredient to build a union through electronic signatures. The GPEA dictates that the Board must accept electronic signatures to meet the showing of interest requirement, which is an administrative step by which the Board determines if workers are truly interested in forming a union before spending its resources on holding an election. With the use of electronic signatures or electronic authorization cards constituting a showing of interest, social media may quickly become a new medium for organizers to connect with potential members and obtain an electronic signature showing a willingness to join a union. Since employees can also provide an electronic signature or authorization card on a computer in their own privacy, this may also make the process fairer and expedite pre-election hearings.

CONCLUDING ANALYSIS

There is no denying that social media has forever created a shift in the way we communicate with one another, particularly within the workplace. While the use of social media platforms like Facebook and Twitter have created powerful opportunities for organizations to supplement their recruitment and marketing strategies, employee use of social media in the workplace has quickly become a phenomenon that has turned into an evolving and controversial topic in labor law. As employees have begun to resort to status updates to air their work-related frustrations, employers have taken efforts to develop restrictive social media policies to limit what workers can say online. In response to workers being fired for their posts on social media,

labor unions have begun to educate members on their rights and legal risks associated with discussions on Facebook and other social networks. In this final section, we will review the research contributions of this thesis, reflect on the way the NLRB has decided on social media cases, and discuss how unions can embrace social media to engage in conversations with members and drive campaigns.

In a series of recent rulings and guidance memoranda, the NLRB has ordered the reinstatement of a number of workers fired for their posts on a social media platform and has advised companies nationwide to rewrite their social media rules. After analyzing the facts and decisions from each case, it is evident that the NLRB has applied both traditional principles of labor law to this new technology, as well as created case law to address features on social media that required new standards to be set. According to the NLRB, employees have a right to discuss work conditions freely on social media platforms without fear of retaliation, whether the discussion takes place at the office or at an employee's home. Using social media to air out work-related frustrations is considered to be protected activity when an employee acts with or on the authority of other employees, the speech occurs in the context of an ongoing labor dispute, or when the employee's statements are not too egregiously disloyal, reckless or maliciously untrue. The Board has also concluded that new features on social media, for example a single mouse click on the "Like" button on a Facebook page, constitutes substantive speech that may be protected even without a message following in text form.

The NLRB has scrutinized and prosecuted companies for maintaining social media work-rules that are overly broad and reasonably tend to chill employees in the exercise of their Section 7 rights. According to the Board, blanket restrictions on employee use of social media are illegal, and bans on "disrespectful" comments or posts that criticize the employer or workplace are also

unlawful. While the NLRB's recent decisions and guidance provide some direction for employers to develop social media policies, drafting a policy that complies with the NLRA is no easy task. Social media work-rules must provide employees with a solid understanding of what constitutes appropriate and lawful online behavior through case examples. A social media policy should use specific and clear language by using plain English, and should avoid overly sophisticated or legal terminology. While including provisions indicating that the language in the policy should be interpreted in such a manner adherent to the law is permissible, employers should not rely on the use of a "savings clause" to cure ambiguities and overbroad work rules. Moreover, there is no "one size fits all" social media policy. While the policy recommendations set forth in this thesis generally apply to all industries, organizations should tailor their social media work-rules to the specific needs of their company. After drafting a policy, employers are well advised to consult with labor attorneys or institutes such as Cornell University's Center for Advanced Human Resources Studies (CAHRS) to verify that the policy does not infringe on employees' rights.

Since employers unilaterally implement corporate social media policies, labor unions should begin to engage in collective bargaining over work-rules regarding the appropriate use of social media. Negotiating over these policy provisions can allow unions to ensure that social media policies adhere to the guidelines set forth by the NLRB. The labor movement should also respond to the emergence of social media by providing educational programs to its members on their rights and legal risks associated with using online platforms like Facebook and Twitter to discuss work-related matters. Although a few unions have begun to offer training workshops related to using social media to confront problems at work, providing this type of education is not longer just a good idea, but rather a necessity. Informing members on lawful

social media activity will help employees understand the company's expectations and avoid potential discipline.

Moreover, labor unions should continue to use social media platforms to communicate and create a virtual connection with existing members, potential members and supporters around the world. Through social media, unions can foster direct communication and constant dialogue with individuals to raise issue awareness and gain leverage during contract campaigns. Unions should perceive platforms like Facebook and Twitter as a billboard or megaphone to broadcast messages to the general public, and a supplement to traditional forms of media and news distribution. While establishing a presence on social media is the first step, it is important that unions be constant in their online activities by updating their profiles, uploading videos and sharing photos.

While the NLRB has provided guidance on employee use of social media to discuss work-related matters, this is still a developing area of labor law, and the public can be sure to receive additional direction as new features are created on social networking sites. Since new rulings can quickly make relevant policies outdated, employers, employees, labor unions, employment attorneys and human resources practitioners must be consistent in keeping current with NLRB cases as it relates to social media. As for public sector employees, the Board's heightened awareness on employee use of social media cases will undoubtedly pressure state level public employment relations boards or their equivalents to issue a decision or provide clarity on the distinctions and similarities between private and public sector labor law as it applies to social media. While social media is only a supplement to face-to-face communication and traditional forms of media, its use is only growing and becoming more pervasive in the modern workplace. This thesis provides a foundation for the way employers and their employees

should become familiar with the great opportunities and potential risks of social media in the workplace. Understanding the power of social media can forever change the way we communicate by facilitating open communication and transparency within an organization.

APPENDIX A: METHODOLOGY

To further my knowledge on employee use of social media in the workplace, as well as better understand how labor unions are using social media to disseminate information to their members and the public, I used a mixed methods approach. Throughout my research, I analyzed NLRB decisions and guidance memoranda, explored published literature and conducted substantive interviews with individuals who have made social media an area of expertise. I would like to note that all the case materials and memos I have referenced, including the Advice Memoranda, are available to view on the National Labor Relations Board's website, http://www.NLRB.gov.

Since my research is an extension of my Senior Honors Thesis, I already had knowledge of the way traditional labor laws played a role in deciding social media cases. When I had completed my Honors Thesis, NLRB Acting General Counsel Lafe Solomon had issued three memoranda detailing the results of investigations in dozens of social media cases. At the end of my Master's research, Acting General Counsel Solomon released twenty-one memoranda regarding social media-related adverse employment decisions, as well as social media policies in the workplace. After analyzing the eighteen new memos, I had the opportunity to interview former NLRB Chair Wilma Liebman, who phoned Acting General Counsel Solomon during our meeting to discuss my research and a few short questions I had prepared in advance to our conversation. In addition, I had the opportunity to interview former General Counsel Ronald Meisburg and attend a lecture presented by Acting Chairman of the NLRB Mark G. Pearce titled "Social Media, Work Rules and Workers' Rights Under the National Labor Relations Act" at Cornell University Law School.

To better understand the structure of the NLRB and the legal ramifications of the Board's decisions on social media cases, I consulted with Cornell University ILR School Professors Esta Bigler and Kate Griffith. Their background in law and labor relations allowed me to deepen my understanding on the way the Board has decided social media cases. In addition, I spoke with Risa Mish, Senior Lecturer of Management at the Cornell University Johnson School of Management. Professor Mish also had a background in labor law, and in her practice has advised many clients on developing lawful social media policies. Through these interviews, I was able to ask questions and learn more about the way in which Board decisions are chosen and decided.

My understanding of the way organizations are responding to employee use of social media in the workplace was formed by reading published articles found in Human Resources journals and publications such as Human Resources Management and those published by the Society for Human Resources Management (SHRM). In addition to literature review, I consulted with Steve Miranda, Managing Director at Cornell University's Center for Advanced Human Resource Studies. Miranda is the former Chief HR and Content Integration Officer for the Society for Human Resource Management (SHRM). Miranda contacted the Vice President, Content and Partnerships, at eCornell, Chad Oliveiri, to grant me demo-access to Miranda's e-Cornell course titled, "Designing and Implementing Effective Social Media Policy." With access to the course, I was able to view the many PowerPoint slides and handouts on developing corporate social media policies to Human Resources Associates in large multinational corporations. Moreover, I interviewed Cornell University ILR School Human Resources Professor Lisa Dragoni to discuss whether the emergence of employee use of social media in the workplace has been incorporated into any Human Resources textbooks or classroom discussions at the University level. My work also relied on materials from several PowerPoint presentations

by attorneys from Proskauer Rose LLP addressing the social media policies.

To gauge how organized labor uses social media platforms to connect with members, potential members and supporters as well as to develop innovative contract campaigns, I engaged in four interviews with participants in the 2014 Harvard Trade Union Program. During my time in the Program, I made three in-class announcements and sent a follow-up e-mail to 44 trade union participants who attended the Program from four different nations. I asked the participants to contact me if their union provides any formal or informal training on employee use of social media. Of the 44 participants, I secured phone and Skype interviews with three public sector leaders and one private sector trade union leader when I returned to Cornell University. I interviewed the following people: (1) Michelle Washington, primary contact staff representative for the California Teacher's Association; (2) Erik Wilke, Senior Associate Counsel for the Civil Service Employees Association; (3) Carmen Flores, Chair of the American Federation of State, County and Municipal Employees Next Wave Counsel Committee for District 37 in New York City; and (4) Gary Maas, Australian National Union of Worker's Victorian Branch Assistant Secretary.

In addition, I called 57 of the largest unions in the United States in hopes of speaking to a communications coordinator, field services representative or research director to better understand how unions are using social media to communicate with members and the public, and well as whether they are offering educational programs related to social media. Of those 57 unions, I secured nine over-the-phone interviews with individuals responsible for managing the union's social media accounts. I interviewed the following people: (1) Alvin Velazquez, Associate General Counsel at the Service Employees International Union (SEIU); (2) Sahar

Moridani, Assistant Executive for Communication at the Directors Guild of America (DGA); (3) Michelle Ellis, Director of New Media for the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM); (4) Mesha Williams, Social Media Coordinator for the International Association of Fire Fighters (IAFF); (5) Emily Harris of the United Mine Workers (UMW); (6) Robin Burns, Assistant Director for Media Relations for the American Association of University Professors (AAUP); (7) Jamie Way, Senior Digital Communications Coordinator at the United Food and Commercial Workers International Union (UFCW); (8) Karen Hickey, Communications Director at Wisconsin State AFL-CIO; and (9) Connie Mabin, New Media Director for the United Steelworkers International.

Of the 48 unions with which I was unable to schedule a phone conversation, I sent an e-mail to the appropriate communications representative with four short questions on the union's use of social media, and whether it offers education programs to teach members of their rights and legal risks in relation to social media. A sample e-mail is provided in Appendix B. From those e-mails, I secured an additional six phone interviews. I interviewed the following people: (1) Erica Hilton, Media Manager at the Laborers' International Union of North America (LIUNA); (2) David Roscow, Assistant to the Amalgamated Transit Union (ATU) President for Communications; (3) Nicole Korkolis, Director of Communication, Education and Research at the Office and Professional Employees International Union (OPEIU); (4) Holly Deal Bales, Research Director at the National Fraternal Order of Police; (5) Beth Allen, Online Communications at the Communication Workers Union (CWU); and (6) Adriana Douzos, Social Media and Public Relations Manager.

To better understand whether unions are offering their members educational programs or

training workshops related to employee use of social media in the workplace, I called the 14 unions listed as members in the United Association for Labor Education (UALE). These unions are the AFGE, AFL-CIO, AFSCME Education Department, AFT, CWA, I.A.M.A.W. William W. Winpisinger Center for Education and Technology, IBT, Los Rios College Federation of Teachers, NEA, SEIU, AFL-CIO, UFCW, USW Education and Membership Development Department, and WA State Council of Firefighters. Of the 14 unions, I was able to secure 2 phone conversations. My first conversation was with Ron Mattock, UFCW National Field Director, and subsequent interview was with Helen Kramer, Executive Assistant at Washington State Council of Fire Fighters, and Ron Mattock, Assistant to Regional Director at the UFCW. Kramer even forwarded me the entire PowerPoint presentation from the WA State Council of Firefighters educational seminar on employee use of social media and free speech. My research also led me to contact Jeff Grabelsky, Associate Director of the ILR School's The Worker Institute. Grabelsky placed me in contact with his colleagues Ken Margolies and Professor Lowell Turner who have shared insights about unions that are using social media to communicate with their members and move their campaigns.

Moreover I engaged in a substantive interview with Kathy Cummings, President of the International Labor Communications Association (ILCA). Cummings, alongside her team of labor communicators, provides training and assistance to labor unions on developing innovative communication strategies. I also conducted a phone interview with Sean Mackell, Program Coordinator at New York City Central Labor Council, AFL-CIO. Mackell conducts training on digital strategies and online communications for the union's member affiliates. My research was then supplemented by an interview with Cornell University ILR School Professors Kate Bronfenbrenner on March 5, 2014. Professor Bronfenbrenner's research interests include

tracking how organized labor has used social media as a tool in union organizing. I also interviewed Robert Bruno, Professor of Labor and Employment Relations at the University of Illinois at Urbana-Champaign and Director of its Labor Education Program in Chicago. Professor Bruno has worked extensively with the Chicago Teacher's Union, and advised the union on its social media contract campaign in 2012.

In addition, on May 2, 2014, I will attend the American Bar Association Section of Labor & Employment Law National Symposium on Technology and Labor and Employment Law hosted at New York Law School. The sessions I will be attending related to my thesis are: (1) "Where Is The National Labor Relations Act? Non-Traditional Organizing And Technology" taught by Katy Dunn, SEIU Local 32BJ, New York, NY; (2) "BYOD And Social Media: The Next Generation" taught by William Herbert, National Center for the Study of Collective Bargaining in Higher Education and the Professions, Hunter College, New York, NY; (3) "Social Media Discovery- Hashtags to (Legal) Holds" taught by Lauren Schwartzreich, Littler Mendelson, P.C., New York, NY; (4) "Ethics Panel- Cybersecurity for Lawyers" taught by Jody Westby, ABA Cybersecurity Task Force, Chair of the Critical Infrastructure Working Group, Washington, D.C.; and (5) "Where Do We Go From Here" taught by Representative Manuel Natal, Member of the Puerto Rico House of Representatives, San Juan, PR. By attending the conference, I will be able to deepen my understanding even more about the legal risks associated with employee use of social media from expert union lawyers.

APPENDIX B: E-MAIL SENT TO 57 LARGEST UNIONS IN THE UNITED STATES

Dear Mr. or Ms. (Name):

My name is Saba Vahdat, and I am a Master's candidate at Cornell University's School of Industrial and Labor Relations. The focus of my research is around the way unions are utilizing social media to connect with members and the general public. During the course of my research, I have noticed that the (Union Name) has a strong presence on Facebook and Twitter, and was hoping you would be willing to answer a few short questions to help me better understand how social media plays a part in your union.

1. How does the union use social media platforms to connect with members, potential members and supporters? (I.e., does it remind members of marches and rallies, urge people to sign petitions, encourage workers to organize?)

2. How much is the union reliant on old forms of media (newsletters, television) or face-to-face conversations to build support for political action? Has the emergence of social media shifted this reliance?

3. How often does the union use social media to share photos of events with followers or create Twitter trends through hashtags?

4. Does the union hold any formal or informal training sessions to inform members of their rights and legal risks associated with the use of social media in the workplace?

Thank you in advance for your time and consideration. Your response to these questions will undoubtedly propel my research and better understand how the (Union Name) uses social media as a vital communications tool.

Warm regards,
Saba Vahdat

APPENDIX C: GLOSSARY OF SOCIAL MEDIA TERMINOLOGY

A **profile** is a Web page where individuals can convey information about themselves. A typical profile may include a username, contact information, personal or business interests, a photo, or other data.

A **social network** is a community of profiles and other Web 2.0 tools for member interaction. Examples: Facebook, Twitter, YouTube.

A **comment** is a response that if often provided as an answer or reaction to a post or message on a social network platform.

A **friend** on Facebook is an individual user that you have allowed to see your Facebook profile and engage with you. A user can decide to disconnect their Facebook friendship by un-friending another user. On Twitter, users can connect with other users by electing to **follow** another user.

A **like** is an action that can be made by a Facebook user. Instead of writing a comment for a message or a status update, a Facebook user can click the "like" button as a quick way to show approval of the message.

A **news feed** is the homepage of users' social media account where they can see all the latest updates from their friends.

A **conversation** through a social media network is when users exchange thoughts by adding comments to previous posts.

A **forum** or **thread** is a private discussion on a social media site where invited users can post messages or comment on existing messages without non-invited users being about to view those comments. This function allows for private group-chat.

A **wall** is a section on a user's profile where others can write messages to you or like comments or status updates. The wall is a public writing space so others who view your profile can see what has been written on your wall.

An **upload** onto a social media network is when a user transfers an image or video onto their personal wall.

A **Tweet** is a 140-character update shared through Twitter.

A **Web 2.0** is a term describing the generation of Web social networking platforms that emphasize collaboration and interactive information sharing.

A **viral** post is a term used to refer to a very popular and highly consumer particular post whether is a photo, video, or text based, which is continuously reposted.